

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT J. MCKINNEY

Claimant

VS.

FRY WAGNER MOVING & STORAGE

Respondent

AND

**LIBERTY MUTUAL INSURANCE COMPANY
and WESTERN GUARANTY FUND SERVICES**

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) Docket Nos. 264,128; 264,129;
) & 264,130
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ORDER

Respondent and both Liberty Mutual Insurance Company and Western Guaranty Fund Services appealed the April 28, 2004 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on October 19, 2004.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Lynn M. Curtis of Kansas City, Missouri, appeared for respondent and Liberty Mutual Insurance Company (Liberty). And Kirby A. Vernon of Wichita, Kansas, appeared for respondent and Western Guaranty Fund Services (Western).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the parties agreed at oral argument before the Board that the medical records introduced at the preliminary hearings were not part of the evidentiary record for purposes of the final award. The parties also agreed that any medical reports that were generated due to a court-ordered evaluation were part of the record for the final award. The parties specifically agreed the record includes the June 20, 2001 medical report prepared by Dr. Terrence Pratt and the June 27, 2001 report prepared by Dr. Scott A. Langford.

ISSUES

The April 28, 2004 Award addresses three different claims filed by claimant. The claim for a June 13, 1998¹ accident was assigned Docket No. 264,129. The claim for a series of repetitive traumas through July 20, 1999, was assigned Docket No. 264,128. And the claim for a March 2, 2000 accident was assigned Docket No. 264,130.

In the April 28, 2004 Award, Judge Foerschler held claimant sustained a 40 percent whole person functional impairment due to bilateral carpal tunnel syndrome and right shoulder injuries that the Judge attributed to the accidents that were claimed in Docket Nos. 264,128 and 264,130. The Judge also held claimant sustained a 12 percent right upper extremity functional impairment that the Judge attributed to the accident that was claimed in Docket No. 264,129. Accordingly, the Judge awarded claimant permanent disability benefits based upon those functional impairment ratings.

Western, which is a guaranty insurance fund that is responsible for any award entered in either Docket Nos. 264,128 or 264,130, contends Judge Foerschler erred. Western argues it should not be responsible for the right shoulder injury alleged in Docket No. 264,128 as the injury was actually caused by the June 13, 1998 accident that claimant alleged in Docket No. 264,129. Accordingly, Western argues the benefits for claimant's right shoulder injury should be assessed against Liberty. Western also argues it is not responsible for any permanent disability benefits in Docket No. 264,130 as claimant failed to prove he sustained any permanent injury in that claim for a right elbow injury. In its brief to the Board, Western concluded:

Based upon the competent evidence in the matter at hand, this Board should conclude that claimant's right shoulder impairment is directly attributable to the June 12, 1998 accident. Furthermore, this Board should substantially reduce the percentage of impairment awarded by Judge Foerschler for the right shoulder, right elbow and both wrists as his Award was calculated incorrectly and not in accordance with the ratings provided in this claim.²

Liberty, which is the insurance carrier involved in only Docket No. 264,129, also contends Judge Foerschler erred. Liberty argues Western or the Kansas Workers Compensation Fund should reimburse it the temporary total disability benefits that Liberty mistakenly paid for the period from July 21, 1999, through November 21, 1999, in Docket No. 264,128. Liberty contends the Judge also erred when he awarded compensation

¹ The application for hearing filed with the Division of Workers Compensation indicated a June 13, 1998 accident but there are various statements in the record that the accident occurred on June 12, 1998.

² Respondent and Western's Brief at 10 (filed July 8, 2004).

against both Liberty and Western for the 40 percent permanent partial general disability the Judge attributed to Docket Nos. 264,128 and 264,130. On the other hand, Liberty concedes that the award against it in Docket No. 264,129 for the June 13, 1998 accident and resulting injury to claimant's right biceps should be increased to award claimant a 15 percent impairment to the right upper extremity. Finally, Liberty disputes that claimant's right shoulder injury was caused by the June 13, 1998 accident for which it is responsible.

Claimant also contends the April 28, 2004 Award should be modified to award claimant a 15 percent disability to the right upper extremity due to the June 1998 accident in Docket No. 264,129. But claimant argues the Award should be affirmed as to the 40 percent permanent partial general disability awarded in the other two docket numbers.

Claimant has retired and makes no claim for a work disability.³

The issues before the Board on this appeal are:

1. In Docket No. 264,129, what is the nature and extent of claimant's injury and disability from the June 13, 1998 accident?
2. In Docket No. 264,128, did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
3. If so, what is the nature and extent of injury and disability from the alleged series of repetitive traumas?
4. And in Docket No. 264,130, did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
5. If so, what is the nature and extent of injury and disability from the alleged March 2, 2000 accident?
6. Is Liberty entitled to reimbursement for the temporary total disability benefits it mistakenly paid in Docket No. 264,128?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

³ A permanent partial general disability greater than the functional impairment rating.

1. In February 2001, claimant filed an application for hearing with the Division of Workers Compensation alleging he injured his right upper extremity while loading a truck for respondent, which is a moving and storage company. The Division assigned that claim, which alleged a June 13, 1998 date of accident, Docket No. 264,129.
2. In June 1998, Liberty was respondent's workers compensation insurance carrier. Claimant and Liberty stipulated claimant injured his right arm in the June 13, 1998 accident that resulted in a 15 percent functional impairment to the right upper extremity.⁴
3. Shortly after the June 1998 accident, claimant began receiving medical treatment for his right arm injury from Dr. Lanny W. Harris. Dr. Harris diagnosed a right biceps strain and provided claimant with conservative medical treatment. The doctor treated claimant from June 22, 1998, through November 17, 1998, when he released claimant without restrictions. In January 1999, the doctor rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.) as having a 15 percent functional impairment to the right upper extremity above the elbow level.
4. Claimant missed some time from work following the June 1998 accident. But claimant initially returned to work performing light duty and in October 1998 resumed his regular duties of driving and delivering furniture. After returning to work, claimant began experiencing symptoms in his right shoulder.
5. Claimant did not see Dr. Harris for approximately five months. On April 26, 1999, however, claimant returned to Dr. Harris for right shoulder treatment. The doctor diagnosed chronic rotator cuff tendinosis and a possible rotator cuff tear. The doctor initially thought claimant's shoulder injury might have been related to the earlier right biceps injury.
6. Claimant denied having any right shoulder symptoms at the time of the June 1998 accident and that those symptoms began in the spring of 1999. But Dr. Harris' notes from claimant's April 26, 1999 office visit read, in part:

Robert McKinney has returned today for an evaluation of his **right upper extremity**. Ever since going back to work a few weeks ago, he has had some chronic pain in his right biceps area that radiates up to the shoulder. Certain positions of movement aggravate it. He

⁴ R.H. Trans. at 8.

has not been able to do all of his full activities, although he has done his full work. He has had to alter and back off because of pain in the right anterior shoulder and upper biceps area, especially on forward elevation and certain rotational activities. He has no specific history of particular additional injury, but ever since he went back to work, this has been bothering him.

. . . .

Impression: Chronic rotator cuff tendinosis, possibly a rotator cuff tear. This may be related back to his injury with his biceps, but at that time his major problem has been the biceps and the distal elbow area, and only upon return to work did he notice the problem with the use of his shoulder, and it has become progressive as he has attempted to use it at work more and more.

It is certainly possible that he may have sustained some injury to the rotator cuff at the time of the original injury, and the symptoms were overshadowed with the distal symptoms. However, clearly upon return to work his symptoms in his shoulder have now become prominent.

He should have this area assessed with an MRI to assess the integrity of the rotator cuff.⁵

7. Claimant underwent an MRI on his right shoulder that showed he had an impingement, degenerative joint disease, and a bone spur in his shoulder. After physical therapy and an epidural steroid injection did not relieve claimant's symptoms, Dr. Harris operated on claimant's right shoulder in July 1999, performing a subacromial decompression with an acromioplasty resection of the lateral clavicle. On February 10, 2000, the doctor released claimant from treatment with no restrictions. On February 14, 2000, Dr. Harris rated claimant's right shoulder injury as comprising an additional five percent functional impairment to the right upper extremity using the *AMA Guides* (4th ed.).
8. Following the July 1999 right shoulder surgery, claimant returned to work for respondent in either late 1999 or early 2000, initially observing the restrictions from a functional capacity evaluation. And by February 2000, claimant had returned to his regular work duties. Claimant continued to work for respondent and on March

⁵ Harris Depo., Ex. 5.

2, 2000, he sustained another injury when he caught his right elbow between two filing cabinets.

9. Claimant continued working for respondent through April 5, 2000, when he retired. On that same day, claimant sought medical treatment for his right elbow. Shortly afterwards, respondent referred claimant to Rockhill Orthopaedics of Kansas City, Missouri, for treatment. According to claimant, when he retired he was having minor symptoms in his right shoulder and his left wrist as his shoulder would sometimes pop and his left wrist would be sore after moving furniture.⁶
10. After claimant retired in early April 2000, he experienced increased right shoulder symptoms. Consequently, after not seeing the doctor for approximately eight months, claimant returned to Dr. Harris in December 2000 seeking additional treatment for his right shoulder. The doctor diagnosed recurring impingement secondary to chronic tendinosis and prescribed epidural steroid injections and physical therapy.
11. As indicated above, in February 2001 the Division of Workers Compensation received an application for hearing for the June 13, 1998 accident and right biceps injury. On the same date, the Division also received an application for hearing alleging injuries to the right upper extremity due to "[r]epeated work activities" from "[r]epetitive trauma through 7/20/99."⁷ And in March 2001, the Division received an application for hearing claiming a March 2, 2000 injury to the right upper extremity that occurred when claimant's right arm was caught between file cabinets. All three applications indicated they were signed on the same date, February 20, 2001. None of the applications mentioned a left upper extremity injury.
12. During the physical therapy that Dr. Harris prescribed for claimant's right shoulder, claimant began experiencing numbness in his left shoulder and tingling in his left arm. Dr. Harris' March 16, 2001 office notes indicate claimant developed left shoulder pain within a day or two of one of the injections to the right shoulder. Dr. Harris also noted he was concerned the exercises claimant was doing in therapy were causing subacromial irritation and that claimant should have nerve conduction tests.
13. At a March 29, 2001 preliminary hearing, claimant requested medical treatment for his left upper extremity and right elbow surgery that had been recommended by the

⁶ R.H. Trans. at 22.

⁷ Application for Hearing in Docket No. 264,128 (filed Feb. 23, 2001).

physicians at Rockhill Orthopaedics. At that time, claimant was experiencing pain and popping in his right shoulder, both arms were going “to sleep,”⁸ and he had pain in his right elbow.

14. After the March 2001 preliminary hearing, the Judge issued a Supplemental Order dated May 16, 2001, in which the Judge, among other things, ordered respondent to provide nerve conduction tests. The tests were conducted. As indicated above, the parties agreed the June 20, 2001 report from Dr. Terrence Pratt and the June 27, 2001 report from Dr. Scott A. Langford were part of the record for purposes of final award. The history contained in Dr. Pratt’s report indicates claimant’s left upper extremity symptoms began in early 2001 after his neck popped during physical therapy. The history from Dr. Pratt reads, in part:

The patient presents with a note that he was court ordered for assessment of his bilateral upper extremities. He has plans to see Dr. Langford once the study has been completed. He complains of bilateral upper extremity symptoms, noting the onset with the right shoulder with a procedure in 1999. He had prior electrodiagnostic study revealing peripheral nerve entrapment. Two months ago he was participating in a therapeutic program, with popping of the cervical region. Since that time he has had general involvement of the left upper extremity primarily with numbness and primarily on the right. He complains of symptoms from the medial elbow to the hand with sensory symptoms. He denies difficulty with bowel/bladder. He complains of bilateral upper extremity weakness.

According to Dr. Pratt, claimant’s June 2001 nerve conduction studies were consistent with a cervical radiculopathy of the lower cervical region, with bilateral involvement. The studies were also consistent with bilateral carpal tunnel syndrome, moderate to severe on the left and moderate on the right. In short, Dr. Pratt’s impression was that claimant had cervical radiculopathy, bilateral median nerve entrapment at the wrists, bilateral ulnar nerve entrapment at the elbows, and possible ulnar nerve entrapment at the wrist level.

15. Dr. Langford’s June 27, 2001 report indicates right carpal tunnel syndrome was suspected as early as October 2000. The doctor’s report also contains a history that claimant experienced left upper extremity pain during physical therapy for his right shoulder. Dr. Langford’s June 27, 2001 report states, in part:

⁸ P.H. Trans. (Mar. 29, 2001) at 17.

This patient comes back in for follow-up or as a reevaluation of a previous problem for which I had seen him before. He was last seen in approximately October of 2000. At that time I believed he had right carpal tunnel syndrome and right cubital tunnel syndrome. I offered him surgery. Apparently there was some difference in opinion through his workers' comp payer that resulted in a delay in his treatment. I believe he is actually retired now.

He apparently had a court order for evaluation of his problems.

He presents the history that he was receiving care for a workers' compensation shoulder injury through Dr. Lanny Harris. Apparently through the therapy, he was pulling or pushing something and felt a pop in his neck and then began to have pain extending down his left upper extremity. He complains of pain and numbness extending down his entire left upper extremity out into his hand. He is not able to localize the numbness. He states that his left upper extremity complaints are worse than the right side at this time.

Based upon his evaluation, Dr. Langford diagnosed cervical radiculopathy, bilateral carpal tunnel syndrome, and bilateral cubital tunnel syndrome.

16. After considering Dr. Pratt's medical opinions, Judge Foerschler issued an Order on July 16, 2001, which authorized claimant to seek treatment with a neurosurgeon. And on September 5, 2001, claimant saw Dr. Stephen L. Reintjes with the Kansas City Neurosurgery Group. Dr. Reintjes concluded claimant had an osteophyte on the cervical spine, which was not related to work, that was causing moderate stenosis of the right C6-7 foramen. The doctor also concluded claimant had bilateral carpal tunnel syndrome and recommended surgery.
17. On June 7, 2002, claimant returned to Dr. Harris for treatment. At that point in time, claimant had been diagnosed as having a cervical radiculopathy superimposed upon a carpal tunnel syndrome and cubital tunnel syndrome.⁹ Claimant complained of popping in his right shoulder, right elbow pain, sore wrists, numbness and tingling in his hands, and popping and locking of his two middle fingers. In the patient information sheet claimant completed on June 7, 2002, claimant noted he injured his right shoulder and wrists lifting at work and injured his right elbow when he crushed it at work.¹⁰

⁹ Harris Depo., Ex. 6.

¹⁰ *Id.*, Ex. 8.

18. On July 23, 2002, Dr. Harris operated on claimant's right wrist and right elbow, performing a cubital tunnel release with ulnar transposition, carpal tunnel release, ulnar tunnel release, and long trigger finger release. And on September 24, 2002, Dr. Harris operated on claimant's left wrist, performing a carpal tunnel release and left flexor tenosynovectomy.
19. While claimant was recovering from his bilateral arm surgeries, Dr. Harris ordered an MRI on claimant's right shoulder, which showed advanced degenerative changes and fraying of the rotator cuff. The doctor recommended a second surgery on claimant's right shoulder. On October 14, 2002, Dr. Harris responded to a letter from one of the respondent's former attorneys to explain the recommended shoulder surgery. In that letter, Dr. Harris stated he believed the ongoing problems with claimant's right shoulder were due to claimant's June 1998 accident. The doctor's letter read, in part:

I don't believe that Mr. McKinney has been very active with that shoulder since leaving Fry-Wagner, at least not according to the history that I have obtained from him. Therefore I believe all of this is residual to that June 12, 1998 incident.¹¹

On the other hand, Dr. Harris testified he believed the work claimant performed after returning to work following treatment for the right biceps injury aggravated and accelerated the right shoulder injury.¹²

20. After a delay in receiving authorization for surgery, Dr. Harris again operated on claimant's right shoulder on January 14, 2003, exploring the rotator cuff, decompressing the subacromial space, and freeing adhesions.
21. In December 2003, Dr. Harris rated claimant's functional impairment. According to the doctor, under the *AMA Guides* (4th ed.) claimant had a five percent functional impairment to the right upper extremity following the July 1999 right shoulder surgery and a 14 percent functional impairment following the January 2003 right shoulder surgery. The doctor also concluded claimant sustained no permanent impairment due to the right elbow injury or the bilateral carpal tunnel syndrome. Dr. Harris did, however, conclude claimant's bilateral carpal tunnel syndrome and right cubital tunnel syndrome were related to claimant's work.¹³

¹¹ *Id.*, Ex. 2.

¹² Harris Depo. at 20.

¹³ *Id.* at 16.

22. Dr. Harris did not testify regarding how claimant's bilateral carpal tunnel syndrome and right cubital tunnel syndrome were related to claimant's work. But in a June 19, 2002 letter, the doctor wrote that claimant's left upper extremity problems might be related to the repetitive nature of claimant's former work. The doctor wrote, in part:

Mr. McKinney says that on the right side that it is his understanding that this is clearly work related. I would certainly agree with that based on his history. The left side may certainly be work related because of the heavy repetitive nature of his job that he once had.¹⁴

23. Claimant's attorney hired Dr. James P. Hopkins, whose practice is primarily limited to rating injured workers for their attorneys, to evaluate claimant for purposes of these claims. The doctor examined claimant in September 2003 and concluded claimant had an overuse condition in both upper extremities that had resulted in atrophy in the right biceps and tendinitis and capsulitis in the right shoulder, distal flexor forearm compartments, and wrists.

24. Dr. Hopkins attributed the right biceps injury to the accident claimant sustained at work in June 1998. The doctor attributed the right shoulder injury and both right shoulder surgeries to claimant's work activities in 1999. Dr. Hopkins attributed claimant's right elbow injury to the March 2000 accident, along with claimant's carpal tunnel syndrome. The doctor testified, in part:

[Claimant] had a right elbow injury in March of 2000 which subsequently resulted in some numbness and tingling and problems relating to a carpal tunnel condition as well as an ulnar nerve condition that same year and that despite retiring in April of that year he continued to have the problems requiring bilateral carpal tunnel surgery and cubital tunnel surgery in 2002.¹⁵

25. Dr. Hopkins rated claimant's functional impairment under the *AMA Guides* (4th ed.). The doctor rated claimant's right shoulder impairment at 25 percent to the right upper extremity. The doctor rated claimant's right biceps injury at 15 percent to the right upper extremity. And finally, the doctor initially rated claimant's bilateral upper extremity injuries from the bilateral carpal tunnel syndrome at 20 percent to the

¹⁴ *Id.*, Ex. 2.

¹⁵ Hopkins Depo. at 21.

whole person.¹⁶ On cross-examination, the doctor testified the 20 percent rating to the whole person was attributable to the work claimant performed between February 10 and April 4, 2000.¹⁷

26. On redirect examination, however, Dr. Hopkins testified that a mild impairment to the ulnar nerve increased claimant's functional impairment rating under the *Guides* to a 28 percent whole person functional impairment for the bilateral carpal tunnel syndrome and right cubital tunnel syndrome. Adding in the impairment to the ulnar nerve, the doctor indicated claimant would then have a 30 percent functional impairment (20 percent for the median nerve neuropathy and 10 percent for the ulnar nerve neuropathy) to the right upper extremity. Combining the 30 percent rating for the right upper extremity with the 20 percent functional impairment to the left upper extremity yields a 28 percent whole person functional impairment.¹⁸

CONCLUSIONS OF LAW

Docket No. 264,129 and the June 13, 1998 accident

The Board concludes claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on June 13, 1998, when he injured his right biceps. Both claimant and Liberty stipulated claimant's right biceps injury comprised a 15 percent functional impairment, which was the rating provided by Dr. Harris for that injury.

The Board concludes claimant has sustained a 15 percent permanent disability to the right upper extremity under the scheduled injury statute, K.S.A. 1997 Supp. 44-510d. Consequently, the permanent disability the Judge entered in Docket No. 264,129 should be increased.

The Board rejects Western's argument that claimant injured his right shoulder in the June 13, 1998 accident. The Board finds claimant's testimony persuasive that he did not experience any right shoulder symptoms immediately following the June 1998 accident and that those symptoms did not develop until approximately the spring of 1999.

The Board is mindful Dr. Harris' April 26, 1999 office notes indicate claimant began having right shoulder symptoms "[e]ver since" he returned to work for respondent, which

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 47.

¹⁸ *Id.* at 55-57.

would have been sometime before he resumed his regular duties in October 1998. But those same office notes also indicate Dr. Harris mistakenly believed claimant had been back to work only a few weeks, when claimant had actually been back to work for approximately seven months, without including the period he performed light duty.

Accordingly, the April 28, 2004 Award should be modified to increase the permanent disability to the right upper extremity in Docket No. 264,129 to 15 percent. That award for the 15 percent disability to the right upper extremity, as determined under K.S.A. 1997 Supp. 44-510d, should be entered against respondent and Liberty.

Docket No. 264,128 and the alleged series of repetitive traumas

The Board concludes claimant injured his right shoulder working for respondent after returning to work following his right biceps injury. The Board finds the accidental injury to claimant's right shoulder arose out of and in the course of his employment with respondent.

Dr. Harris believes claimant has sustained a 14 percent functional impairment to the right upper extremity due to the right shoulder injury and Dr. Hopkins believes claimant sustained a 25 percent impairment to the right upper extremity due to that injury. The Board is not persuaded that either opinion is more accurate than the other and, therefore, averages the ratings to find that claimant sustained a 20 percent functional impairment to his right upper extremity due to the right shoulder injuries he sustained while working for respondent.

The medical evidence establishes claimant developed bilateral carpal tunnel syndrome while working for respondent. The medical opinions from both Dr. Harris and Dr. Hopkins indicate claimant's bilateral carpal tunnel syndrome was caused from the repetitive nature of claimant's work. Accordingly, the Board concludes the accidental injuries sustained by claimant due to his bilateral carpal tunnel syndrome arose out of and in the course of his employment with respondent.

The Board finds Dr. Harris' conclusion that claimant fully recovered from his bilateral carpal tunnel syndrome and cubital tunnel syndrome, leaving claimant with no functional impairment from those maladies, is not persuasive. The doctor's office notes do not reflect that claimant made a complete recovery. To the contrary, Dr. Harris' October 28, 2002 notes indicate claimant was experiencing numbness and intermittent swelling in his right hand and that he had limited range of motion in his left hand. The doctor's November 18, 2002 office notes state claimant was continuing to experience symptoms of soreness, tenderness, and weakness, along with stiffness in his long finger in one of his hands. Likewise, the doctor's January 31, 2003 office notes, which were written some six months following the right wrist and right elbow surgery, reflect that claimant's right elbow remained sensitive.

In short, the Board finds no mention in Dr. Harris' notes that reflects claimant made a complete recovery from his bilateral wrist and right elbow surgeries. Moreover, claimant testified at the January 2004 regular hearing that he had ongoing symptoms in his right shoulder, right elbow, and both wrists. And Dr. Hopkins also testified he found claimant had residual symptoms from the bilateral carpal tunnel syndrome.

The Board concludes claimant's functional impairment due to the bilateral carpal tunnel syndrome falls somewhere between Dr. Harris' zero percent rating and Dr. Hopkins' rating of 20 percent to the whole person. Averaging those ratings, the Board concludes claimant sustained a 10 percent whole person functional impairment from the bilateral carpal tunnel syndrome.

Using the *AMA Guides* (4th ed.), the Board combines the 20 percent functional impairment to the right upper extremity (which converts to a 12 percent whole person rating) that claimant sustained due to his right shoulder injury with the 10 percent whole person functional impairment he sustained due to the bilateral carpal tunnel syndrome and concludes claimant sustained a 21 percent whole person functional impairment due to the repetitive trauma injuries he sustained working for respondent. Because the combination of those bilateral injuries is not addressed by the schedule set forth in K.S.A. 1999 Supp. 44-510d, claimant's permanent disability benefits for these injuries are governed by K.S.A. 1999 Supp. 44-510e.¹⁹

Due to the bright line rules established by a series of cases by the Kansas appellate courts, however, the appropriate date of accident for the repetitive trauma injuries that claimant sustained working for respondent is the last day that claimant worked for respondent, which was April 5, 2000.

Because the April 5, 2000 date of accident falls within the period for which Western is responsible, the award entered in Docket No. 264,128 should be against respondent and Western. Liberty has no liability for the benefits due claimant for his right shoulder injury or his bilateral carpal tunnel syndrome.

Because Liberty's coverage ended March 30, 1999,²⁰ Western should reimburse Liberty for the temporary total disability benefits that Liberty paid for the period from July 21, 1999, through November 21, 1999, in connection with claimant's right shoulder injury.

¹⁹ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985).

²⁰ Respondent and Liberty's Brief at 1 (filed June 15, 2004); Respondent and Western's Brief at 2 (filed July 8, 2004).

In *Kimber*,²¹ the Kansas Court of Appeals held that an employer should reimburse another employer and its insurance carrier for the compensation the latter employer and its insurance carrier had paid. The Kansas Court of Appeals wrote, in part:

We hold that Cedars is responsible to reimburse the school district for compensation and expenses arising after the injury which occurred at Cedars on May 15, 1992, and the days that followed. **Clearly, the school district and its insurance carrier should be reimbursed by Cedars for paying compensation and expenses owed by Cedars before the issue of liability was determined by the Board.**²² (Emphasis added.)

And in *Lott-Edwards*,²³ the Kansas Court of Appeals held the Board did not err in ordering one of the insurance carriers to reimburse one of the other insurance carriers that had paid benefits in the claim.

Based upon the above, the April 28, 2004 Award should be modified as to the award entered in Docket No. 264,128. First, claimant should be awarded permanent disability benefits for a 21 percent whole person functional impairment. Second, the award should be entered against respondent and Western. And third, Western should be ordered to reimburse Liberty for the temporary total disability benefits Liberty paid to claimant in connection with the right shoulder injury.

Docket No. 264,130 and the March 2, 2000 alleged accident

The Board concludes claimant injured his right elbow on March 2, 2000, when his elbow was caught between two filing cabinets. The accident arose out of and in the course of claimant's employment with respondent.

As indicated above, Dr. Harris did not believe claimant sustained any impairment due to his right elbow injury and surgery. On the other hand, Dr. Hopkins rated claimant's right elbow injury as comprising a 10 percent functional impairment to the right upper extremity. Dr. Hopkins, however, did not initially rate the elbow as he did not think the injury was of sufficient significance.²⁴ Giving some weight to both opinions, the Board will average the zero percent rating from Dr. Harris with the 10 percent rating from Dr. Hopkins

²¹ *Kimber v. U.S.D. No. 418*, 24 Kan. App. 2d 280, 944 P.2d 169, rev. denied 263 Kan. 886 (1997).

²² *Id.* at 283.

²³ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

²⁴ Hopkins Depo. at 55.

and conclude claimant sustained a five percent functional impairment to his upper extremity due to the March 2, 2000 right elbow injury.

Accordingly, the April 28, 2004 Award should be modified to award claimant a five percent permanent disability to the right upper extremity, as provided by K.S.A. 1999 Supp. 44-510d, in Docket No. 264,130. Again, that award should be entered against respondent and Western.

AWARD

WHEREFORE, the Board modifies the April 28, 2004 Award as follows:

Docket No. 264,129

Robert J. McKinney is granted compensation from Fry Wagner Moving & Storage and Liberty Mutual Insurance Company for a June 13, 1998 accident and resulting disability. Mr. McKinney is entitled to receive 10.57 weeks of temporary total disability benefits at \$351 per week, or \$3,710.07, plus 29.91 weeks of permanent partial disability benefits at \$351 per week, or \$10,498.41, for a 15 percent permanent partial disability to the right upper extremity, making a total award of \$14,208.48, which is all due and owing less any amounts previously paid.

Docket No. 264,128

Robert J. McKinney is granted compensation from Fry Wagner Moving & Storage and Western Guaranty Fund Services for an April 5, 2000 accident and resulting disability. Mr. McKinney is entitled to receive 17.73 weeks of temporary total disability benefits at \$383 per week, or \$6,790.59, plus 86.58 weeks of permanent partial general disability benefits at \$383 per week, or \$33,160.14, for a 21 percent permanent partial general disability, making a total award of \$39,950.73, which is all due and owing less any amounts previously paid.

Western Guaranty Fund Services (Western) is ordered to reimburse Liberty Mutual Insurance Company (Liberty) for the temporary total disability benefits Liberty paid in this docket number. Respondent and Western may receive credit for the temporary total disability benefits that Liberty paid after Western reimburses Liberty.

Docket No. 264,130

Robert J. McKinney is granted compensation from Fry Wagner Moving & Storage and Western Guaranty Fund Services for a March 2, 2000 accident and resulting disability.

Mr. McKinney is entitled to receive 10.50 weeks of permanent partial disability benefits at \$383 per week, or \$4,021.50, for a five percent permanent partial disability to the right upper extremity, making a total award of \$4,021.50, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Lynn M. Curtis, Attorney for Respondent and Liberty
Kirby A. Vernon, Attorney for Respondent and Western
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director